DATE: August 14, 1998

CASE NO: 98-INA-40

In the Matter of

NEWPORT CUSTOM WOODWORKING
Employer

on behalf of

ANICETO P. ROSETE-MELENDEZ
Alien

Appearances: Jose Ramirez, Esq.
for Employer

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Newport Custom Woodworking's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On September 26, 1994, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Aniceto P. Rosete-Melendez. (AF 33). The job opportunity was listed as "Furniture Finisher". The job duties were described as follows:

> Our firm is in the business of producing fine and custom woodworking furniture and cabinets. In this respect, we are desirious [sic] of hiring on a permanent basis, a furniture finisher who will be required to finish new high grade furniture/cabinets to specified color and finish, utilizing knowledge of wood properties, finishes and current styling.
>
> Will also be required to refinish damaged, worn or used furniture and be skilled in restoring this furniture to natural color using various types of acids and neutralizers.
> . . .
>
> Will be required to operate various types of woodworking machines to fabricate, repair or replace parts of wooden furniture. Should also be skilled in selecting finished ingredients and mix them either by hand or machine to obtain specific color or shade to match existing finish.
>
> Will also work with power and hand sanders, spays, varnish, shellac, lacquer and paint.

(AF 33, 35). The stated job requirements for the position, as set forth on the application, included 3 years of experience in the job offered. (AF 33). Special requirements included a resume or letter of qualifications. (Id.).

EDD transmitted the resume of 1 U.S. applicant and referred 1 applicant from its job bank to the Employer. According to the Employer's Results of Recruitment Report, neither of the applicants was hired. (AF 43-44).

The CO issued a Notice of Findings ("NOF") on September 4, 1996, proposing to deny certification because the Employer failed to establish that there is an existing job opening. (AF 29-31). The CO requested that the Employer provide documentation that there is an ongoing business, a current job opening, and that the Employer can afford to employ the worker on a full-time basis. The CO requested, *inter alia*, that the Employer provide: 1) copies of its business tax returns for the past 3 years; 2) copy of its business advertisement in the yellow pages; 3) specify who is currently performing the job duties; 4) a copy of its DE 3DP quarterly contribution return; and 5) a copy of its business plan, if it is the Employer's position that the new employee is required to generate new business. (AF 30-31).

The Employer's attorney submitted the rebuttal dated August 20, 1996, which provided the following information. (AF 19-28). The Employer has been in business for 25 years and currently employs 14 employees. The job opportunity was not created to generate new business. Business demands have created the need for the position, and the current 14 employees are covering for the position. The Employer's attorney argued that the CO lacks the authority to determine whether the Employer has the means to pay the prevailing wage, because this function has been delegated to the Immigration and Naturalization Service ("INS"). (AF 19-20). The Employer submitted copies of the following documents: 1) a business license from the City of Cosa Mesa (AF 24); 2) a business tax certificate from the City of Newport Beach (AF 25); 3) a DE 6 quarterly wage report for Spring 1996 which indicates wages paid to 14 employees (AF 26); 4) the Employer's listing in the yellow pages directory (AF 27); and 5) INS instructions for a Petition for Prospective Immigrant Employee (AF 28).

The CO issued a Final Determination ("FD") on November 6, 1996, denying certification because the Employer failed to establish that there is a bona fide full-time job opportunity, and that the Employer has the ability to pay the Alien the offered wage. (AF 16-18). The CO also found that the Employer refused to provide relevant information that the CO had requested, and that the assertions made by the Employer's attorney do not constitute evidence. (AF 18).

On December 4, 1996, the Employer filed a timely Request for Review. (AF 2-15). The Employer included copies of its Schedule K-1: Partner's Share of Income statement for 1993, 1994, and 1995. (AF 12-14).

On February 13, 1997, the CO denied a Request for Reconsideration and forwarded the file to the Board for review.[1] (AF 1).

Discussion

[1]It appears that the CO treated the Employer's Request for Review as a Request for Reconsideration.

The CO found that the Employer failed to establish that there was a bona fide full-time job opportunity, and that it has the ability to pay the Alien the prevailing wage.

Section 656.3 defines employment as "permanent full-time work by an employee for an employer other than oneself." An employer bears the burden of proving that the position is permanent and full-time, and if an employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988) (*en banc*).

Section 656.20(c)(1) requires that "The employer has enough funds available to pay the wage or salary offered the alien."

The Employer argues that the CO lacks the authority to inquire into whether the Employer has the ability to pay the prevailing wage. The Employer contends that the Department of Labor is precluded from raising the issue because the INS has authority to determine whether the Employer has the funds to pay the Alien. We disagree. It is well settled that an Employer must establish that it has sufficient funds to pay the salary offered to the Alien. 20 C.F.R. § 656.20(c)(1); *See, e.g., Kayveekay Gems*, 94-INA-174 (Dec. 23, 1994); *White Harvest Mission*, 90-INA-195 (Apr. 9, 1991); *Big Joy Chinese Restaurant*, 88-INA-354 & 362 (Oct. 30, 1989).

Next, we note that the Employer submitted its partnership tax statements for the first time with its Request for Review. (AF 12-14). Evidence first submitted with a Request for Review will not be considered by the Board. *See, e.g., La Prairie Mining Limited*, 95-INA-11 (Apr. 4, 1997); *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992). If the CO considers new evidence submitted with a Request for Reconsideration, the Board may consider the evidence if the CO considered the evidence when ruling on the motion. *Construction and Investment Corp.*, 88-INA-55 (Apr. 24, 1989) (*en banc*). However, if the CO did not consider the new evidence when ruling on a Request for Reconsideration, the evidence does not become part of the record and the Board will not consider it. *See Magic Windows, Inc.*, 92-INA-250 (Feb. 3, 1994); *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992). Here, it appears that the CO treated the Employer's Request for Review as a Request for Reconsideration. The CO denied the Request for Reconsideration. (AF 1). Since the CO did not consider the tax records that were submitted with the Request for Review/Reconsideration, because they could have been submitted in the rebuttal, they are not in the record, and we will not consider them.

In the NOF, the CO requested, *inter alia*, that the Employer provide copies of its tax returns. The request was reasonably related to the issues of whether the Employer has the ability to pay the Alien the offered wage and whether there is a bona fide job opportunity. The Employer failed to submit the tax returns with its rebuttal. Denial of certification is proper when the Employer fails to provide reasonably requested information. *See, e.g., O.K. Liquor*, 95-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 93-INA-496, 497 (Aug. 26, 1994); *The Whislers*, 90-INA-569 (Jan. 31, 1992).

In rebuttal, the Employer's attorney responded to the CO's questions from the NOF. The attorney stated, *inter alia*, that: the Employer has been in business for 25 years; the job opportunity is not needed to generate new business; and the current employees are temporarily covering for the position. (AF 19-20). The Employer did not provide a statement, and the attorney's assertions were unsupported. We will not consider these representations because unsupported assertion's by an employer's attorney do not constitute evidence. *Wilton Stationers, Inc.*, 94-INA-232 (Apr. 20, 1995).

The Employer's business license and permits along with its quarterly wage report do establish that there is an ongoing business. However, such evidence does not establish that the Employer has sufficient funds available to pay the Alien or that there is a bona fide full-time job opening currently available. For example, the quarterly wage report indicates that the Employer has 14 employees on its payroll with a range of wages paid from $58.50 to $10,836 for the quarter. (AF 26). While this shows that the Employer does have some full-time employees, it does not indicate whether there is any net profits or other funds available to pay the Alien.

In sum, we agree with the CO that certification should be denied. The Employer failed to timely submit information reasonably requested by the CO, and the Employer failed to establish that it can pay the Alien the proposed wages.

Order

The Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California